Supreme Court of the United States

OCTOBER TERM, 1942

No. 259

IN THE MATTER OF KENTUCKY FUEL GAS CORPORATION

Debtor No. 991-B

H. Clyde Reeves, Commissioner of Revenue of the Commonwealth of Kentucky, Intervening Petitioner ..... *Petitioner.*

Vs.

Ben Williamson, Jr., Trustee of the Kentucky Fuel Gas Corporation.

BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI.

The Decisions of the Courts Below.

The opinion of the District Court is reported in 37 Federal Supplement, 625, and the opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in 127 Federal, 2nd, 657.

Jurisdiction.

The statement of the grounds on which jurisdiction of this Court is invoked is set out in the petition. The Statute of Kentucky, the validity of which is involved, and other pertinent statutes are incorporated in the Appendix to the petition. There is also contained in the petition a concise statement of the material facts to be considered on the question presented.

The final decree of the United States Circuit Court of Appeals was entered on April 17, 1942. Petition for rehearing was subsequently filed and overruled on June 1, 1942. Application for appeal was presented on the third day of July, 1942.

Specification of Errors.

The main points which your petitioner intends to rely upon for a reversal of the decree of the United States Circuit Court of Appeals are as follows:

1. The classification of Postal Savings certificates with other intangibles as provided for by Sec. 4019, Carroll's Kentucky Statutes, Baldwin's 1938 Supplement, is not unconstitutional or discriminatory, and by reason thereof the Circuit Court of Appeals erred in holding that Postal Savings certificates could not be taxed at the rate provided for in said Statute.

2. Sec. 4019 Kentucky Statutes, Baldwin's 1938 Supplement, is valid as applied to Postal Savings certificates held by Kentucky taxpayers.

3. The Postal Savings Depositories Act is not a governmental borrowing agency, and a state statute taxing Postal Savings certificates is not an interference with any governmental function, and does not impose any burden upon the Federal Government.

4. The Circuit Court of Appeals erred in affirming the judgment and order of the District Court dismissing the petitioner's intervening petition.

Summary of Argument.

1. The classification of Postal Savings Certificates with other intangible property at the fifty (50c) cent rate per one hundred ($100.00) dollars, under the provisions of Sec. 4019 Kentucky Statutes, Baldwin's 1938 Supplement, does not violate the due process clause of the Fourteenth Amendment to the Federal Constitution, since the classification is based upon "the difference in the tax collections", or because of "the difference in difficulties and expenses of tax collection."

2. When Congress enacted the Postal Savings Depositories Act, it had no intention of creating a governmental borrowing agency, and since the "intention of the law makers is the law", the Postal Savings system can not be converted into a governmental borrowing agency by either administrative practice or by judicial construction.

3. The money which the tax-payers of Kentucky turn over to the Postoffice Department for deposit remains the property of the taxpayers which the Postmaster merely holds as trustee, and by reason thereof the government does not borrow this money or hold it to be used by it for any governmental purpose. This money, or the certificates representing it, is therefore subject to a non-discriminatory state tax.

4. When it enacted the Postal Savings Depositories Act, Congress had under consideration and acted on the question of tax exemptions. By exempting from taxation Postal Savings bonds and failing to exempt Postal Savings certificates, Congress clearly evinced a purpose to prohibit the taxation of one and to permit the taxation of the other. The taxation of the latter would not cast any burden upon or interfere with the operations of the federal government.

ARGUMENT.

I.

The Tax on Postal Savings Deposits at Fifty Cents Per Hundred Dollars Valuation Is Not Discriminatory.

The Circuit Court of Appeals in the majority opinion said:

> "Obviously taxing Postal Savings certificates and the deposits which they represent five times as much as deposits in banks within the State will cripple the extension, and within Kentucky, possibly destroy the use of Postal Savings. * * * It follows that this tax can not be upheld."

From the opinions of both the District Court and the Circuit Court of Appeals it would appear that this case was considered as a controversy exclusively between the taxing authorities of the Commonwealth of Kentucky and the United States. It is submitted, however, that the sole question involved is whether or not the Commonwealth of Kentucky may lay an intangible property tax on Postal Savings certificates in the hands of the Kentucky taxpayer, and at the rate charged on intangible property generally, without violating the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

In other words, the interests of the United States are not involved, but the validity of Sec. 4019 Kentucky Statutes is involved, and this constitutional question is thereby presented:—Is the Kentucky Statute taxing intangibles invalid as discriminating against the holder of Postal Savings certificates by requiring him to pay the general intangible rate of fifty cents per one hundred dollars whereas the holder of deposit certificates in state and national banks is only required to pay the rate of ten cents per one hundred dollars?

Under the provisions of the Kentucky Constitution all property not specifically exempted is required to be taxed.

> "* * * and all laws exempting or commuting property from taxation other than the property above mentioned shall be void." (Sec. 170 Ky. Constitution)
>
> "All property not exempt from taxation by this Constitution shall be assessed for taxation at its fair cash value * * *." (Sec. 172 Kentucky Constitution)
>
> "Property may be classified for purposes of taxation." (Section 172 Ky. Constitution).

Therefore, all intangible property (which must include postal savings certificates) is, and always has been, subject to taxation in Kentucky. Sec. 4020 Ky. Stat.; Land v. Ky. Joint Stock Land Bank, 279 Ky., 645, 131 S. W. (2d) 838; Commonwealth v. Madden's Executor, 265 Ky. 684; Madden v. Kentucky, 309 U. S. 803, 84 L. Ed. 590.

Although Postal Savings deposits are somewhat in the nature of bank deposits, they are not within the same classification as bank deposits for taxation purposes, for several reasons, some of which are immediately apparent.

It has been pointed out both by this Court and by the Kentucky Court of Appeals that bank deposits are taxed at their source, as required by Kentucky law. The banks pay the taxes and charge same to the separate accounts of their depositors. Kentucky could not require the Postoffice department to pay the tax on Postal Savings deposits and charge same to the accounts of the depositors, nor could the Kentucky legislature require a Postmaster or the Postmaster General to report or disclose to the taxing authorities of the Commonwealth of Kentucky the names of depositors and the amount of each deposit. The Postal Savings law (Sec. 762 Title 39 U. S. C.) prohibits a Postmaster from disclosing the names of depositors and the amount of their deposits without the consent of the Postmaster General.

In fact it is easier for the taxing authorities of Kentucky to discover and assess stocks and bonds held in

Kentucky corporations, and corporations doing business in Kentucky, than it is for them to discover and assess Postal Savings certificates. In Sec. 4019a-10 Kentucky Statutes, it is provided that such corporations shall furnish to the State Tax Commission each year the names and addresses of residents of Kentucky who hold their shares of stocks and outstanding bonds on the date of assessment, July first.

It is therefore obvious that a Kentucky resident owning Postal Savings certificates comes within the same classification for purposes of taxation as does the Kentucky resident having money on deposit in a non-resident bank. (Madden v. Ky., supra).

In the Madden case this Court pointed out that John E. Madden was a citizen and resident of Fayette county, Kentucky. Under Kentucky law (Sec. 4047 and 4114i-12 Kentucky Statutes) he was required to disclose under oath the various items of property owned by him, including intangibles. Under pertinent provisions of the Kentucky Statutes relating to franchise-paying corporations (Sec. 4078, Ky. Statutes) the appellee herein, Trustee for the Kentucky Fuel Gas Corporation, was required to and did file a verified statement wherein he reported the Postal Savings certificates which are sought to be taxed. If the appellee had failed to so report, as did the taxpayer in the Madden case, the Kentucky taxing authorities would have been in the identical position as they were when John E. Madden failed to report the amount of money on deposit in out-of-state banks.

The only distinction noted in the Madden case between the tax on deposits in Kentucky banks and the taxation of deposits in out-of-State banks was "the difference in the tax collection." This same basis of distinction for purposes of classifying Postal Savings certificates and other intangible property is here presented.

The tax on these Postal Savings deposits "* * * still resembled that on investments in Watson v. State Comptroller, the collection of which was said to depend 'either

upon (the taxpayer's) will or upon the vigilance and discretion of the local assessors.' "

So we submit that:

"The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection." (*Madden* v. *Ky.*, supra). See *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495; 81 L. Ed. 1245; *Watson* v. *State Comptroller* of N. Y. 254 U. S. 122, 65 L. Ed. 170.

As was made clear in the Madden case, supra, there is little or no difficulty or expense in collecting taxes at their source. In the matter of state and national bank deposits there is a certainty of collection and an absence of administrative problems. These conditions do not obtain with respect to the assessment and collection of taxes on other types of intangible property such as Postal Savings deposits and the deposits in out-of-state banks. The District Court and the Circuit Court of Appeals appear to have disregarded this basis for a different classification.

II.

The Postal Savings System Is Not A Governmental Borrowing Agency, But Is A Banking System, by Which the Government Receives and Holds Private Funds as Trustee. These Private Funds are Subject to State Taxation.

A. Congress did not create a Governmental borrowing agency when it established the Postal Savings system.

The District Court in its opinion stated that "the Postal Savings system, as now constituted, is a Governmental financing agency". And although not specifically stated in the opinion of the Circuit Court of Appeals, the paramount thought seems to have been that the existence of the Postal Savings system would somehow be endangered if the States were permitted to tax Postal Savings certificates.

An examination of the message of the President of the United States to Congress, and the history leading up to the passage of the Postal Savings Depositories Act, will disclose that Congress had no intention whatever to create a borrowing agency of the Federal Government. Instead, it will be found that the only intent and desire of Congress was to provide safe banking facilities for small depositors who were afraid of banks.

It will be remembered that this country in 1907 passed through a major panic in which thousands of banks failed and bank deposits had been cut in half. Half of these bank deposits had gone into sugar bowls and pine knot holes and Congress was aware of this situation when the Postal Savings Depositories Act came before them. (45 Cong. Record Appendix, page 314). At the time there was widespread demand for either insured bank deposits or a postal savings system similar to that operated in other countries. Indeed the platforms of the two major parties mirror this:

> "We favor the establishment of a postal savings bank system for the convenience of the people and the encouragement of thrift." (Republican)
>
> "We favor a postal savings bank if the guaranteed bank can not be secured, and believe that it should be constituted so as to keep the deposited money in the communities where the depositors live. But we condemn the policy of the Republican party in proposing a postal savings bank under a plan of conduct by which they will aggregate the deposits of rural communities and deposit same while under government charge in the banks of Wall street, thus depleting the circulating medium of the producing regions and unjustly favoring the speculative markets." (Democrat)

In a message to Congress December 3, 1907, President Roosevelt said:

> "I commend to a favorable consideration of the Congress a postal savings bank system, as recommended by the Postmaster General. The primary object is to encourage among our people economy and

thrift and by the use of postal savings banks to give them an opportunity to husband their resources, particularly those who have not the facilities at hand for depositing their money in savings banks."

President Taft, in his message of December 7, 1909, said:

"I believe them to be necessary in order to offer a proper inducement to thrift and savings to a great many people of small means who do not now have banking facilities and to whom such a system would offer an opportunity for the accumulation of capital. They will furnish a satisfactory substitute based on sound principle and actual successful trial in nearly all the countries of the world for the system of government guaranty of deposits now being adopted in several Western States, * * *."

In the Congressional debate we find:

"To sum up, then, the benefits of this law: First, it will provide a place for the savings of the millions of very small depositors in the United States living where no mutual savings banks exist. Second, it will furnish a place for the deposit of money and of savings in nearly 40,000 small communities where no banks now exist. Third, it will furnish a place for the deposit of foreigners who are educated to believe in government depositories, and for the small number of people who are afraid of all banks. Fourth, judging from the history of its operations in other great countries, this law will add millions of dollars to the available business capital of the country. Fifth, it will encourage habits of thrift and economy, especially among children, students and people of small means." (45 Cong. Rec. Page 7701).

Again we find:

"The experience of other countries, that of our own savings banks and that of the penny provident fund, all lead to the conclusion that a system such as this that makes it easy to save will lead to saving and thrift. They also show that the system instead of interfering

with, will be a feeder for the banks. If there is any such natural tendency, then the construction of this bill and the disposal of the deposits that it contemplates will give it every aid. I firmly believe that time will prove this as notable a piece of legislation as Gladstone considered the English system, which he called his best work." (Appendix, Page 314 of 45 Congressional Record).

"If Congress should legislate in favor of this desirable economic condition—to promote the habit of thrift, economy and of saving—and it can do so constitutionally, then certainly it is desirable that it should. There is no more basic fact connected with our industrial progress and with our commercial success than the keeping of the money of the country in channels of circulation ready for investment in every enterprise that shall make for material and for commercial growth. Another reason which has been urged is that in time of financial stress and panic, when money is withdrawn from the banks and therefore withdrawn from circulation, this money deposited in these national depositories would remain there and therefore remain in circulation on account of the absolute confidence which would exist on the part of depositors. While those small depositors are the most sensitive class of our people during a financial depression, and the first to make a run on the banks, yet they would permit it to remain in these depositories and in circulation among the people ready to respond to business demands, and thus would avert the result of such a financial panic." (Rep. Small, Appendix 318 of 45 Congressional Record).

Let us look to the Report of the Committees:

"The effect of postal saving depositories upon established banks has been touched upon in this report at some length and in considerable detail. But separately and apart from the incidental effect on the profits of any particular business, it must always be borne in mind that *the dominant idea in connection with the postal saving is to encourage thrift and a saving disposition among the people.* When account is taken

> of the fact that between 40 and 50 per cent of the depositors in this class of institutions is made up of children and students, no one can fail to perceive that the habit of saving then inculcated in the minds of the youth of the country will be of far reaching and permanent benefit to the rising generation. The child trained to save will grow up with the habit of saving more firmly fixed as the years go by. The shiftless and the thriftless are a burden to society, and any public policy calculated to forestall an increase in the number of such thoughtless people can not but prove beneficial to the whole country." (Emphasis ours) 61st Congress, House Committee Report No. 1445.

It may be argued that because of the 1912 and 1916 amendments to the Postal Savings Depositories Act an intention was manifested on the part of Congress to change the Act to a governmental borrowing agency. However, this argument is not supported by the record. By the 1912 amendment, no change was made in the method of investing funds. By the 1916 amendment there was a change made by the Senate. In discussing this change, Mr. Moon of the House Committee said:

> "The effect of the senate amendment on the original bill was thus: It provided that funds might be deposited in State banks and saving institutions other than those that they were not members of the Federal reserve board. That is a change in the law. It however gives preference to the reserve banks. It is further provided that the board of trustees might take as security for the postal funds not only bonds which were supported by the taxing power, but any bonds authorized by an Act of Congress; for instance, if you passed the rural credits bill the farmers' land and bonds might be for acceptance under the provisions of this bill. That is a change in the law recommended by the Senate and agreed to by the conferees." 53 Cong. Rec. P. 7800.

This is the reason for the passage of the 1916 amendment and not, as will be argued by the appellee, to create a "governmental borrowing agency". The real purpose was

to loosen the rule as laid down in 1910 which only let the Board of Trustees buy tax supported bonds. So, in fact, in 1916 the Postal Savings depositories became less of a Governmental agency than it had been in 1910, because non-tax supported securities might be purchased.

We ask indulgence of the Court to quote from the Conference Report 661 of the 64th Congress (53 Cong. Rec. P. 7798-7800).

> "So much as related to the investment of postal savings funds is stricken out, and in lieu thereof provision is made that when the banks in a State refuse or are unable to accept postal savings deposits originating in that State and the deposits are not needed to make up the 5 per cent reserve fund the board of trustees are empowered to invest such funds. *The authority conferred upon the president to direct the investment of postal savings funds when, in his judgment, the general welfare and interests of the United States so require is continued in the exact terms of the original postal savings act.*" (Emphasis ours).

Thus the 1916 Act did not change this power, and Congress in a joint conference report so stated.

Such being the history and purpose of the Postal Savings Depositories Act, we know of no constitutional principle which would permit or empower the administrative branch of the Government to change the intent and purpose of the legislature. "The intention of the law makers constitutes the law." *Atkins* v. *The Disintegrating Co.*, 18 Wall, 272, 21 L. Ed. 841.

It is perfectly true that under the provisions of the Postal Savings system the trustees of the fund may cause 95% of the funds on hand to be invested in Governmental bonds or other securities. (Title 39 Sec. 759 U. S. C.) This is of course accepted banking practice. This authority given to the trustees would no more convert the Postal Savings system into a governmental borrowing agency than would the investment by national banks of their deposits in

government bonds convert such banks into governmental borrowing agencies.

The assumption that a statute conferring power upon the trustees of Postal Savings deposits to invest same in Government bonds *ipso facto* converts the Postal Savings system into a governmental financing agent is based upon a false premise. The only manner in which the Postal Savings system can be converted into a governmental financing agency is by the authority and act of the legislative branch of government which created the Postal Savings system, and this Congress has not done. The trustees of these funds are holding the funds for the depositors. The deposits belong to the depositors and can be withdrawn at any time. These funds are neither the property of the Postoffice Department nor of the Federal Government. *Leka* v. *U. S.* 69 Ct. Cl. 79, 90; *U. S.* v. *Stewart,* 30 Fed. Sup. 200, 119 Fed. 2nd. 492, 493. Nowhere in the procedure under Sec. 759 Title 39 U. S. C. does the Federal Government borrow any money.

If the government does not borrow this money, but merely holds it subject to the demand of the depositors, there is no basis for the proposition that the Postal Savings system is a Governmental borrowing agency.

Under the section of the Act referred to, Postmasters and the named officers are required to receive and hold as trustees the funds of persons desiring to use Postoffice facilities for deposits rather than state or national banking facilities. No governmental borrowing facilities are authorized or exercised by Postal Savings Depositories Act except under Sec. 760 Title 39 U. S. C., and the bonds therein provided for are in no manner involved in this case.

B. Private Funds held by the Federal Government or Its Agents as Trustees are Subject to State Taxation.

This Court is again presented with a situation where a private corporation is asking to be relieved from state taxation of its private property because of some speculative effect which might result to the Federal Government.

Situations have arisen where the courts have protected private individuals and corporations from the payment of State taxes on the bonds and securities of the Federal Government where the Government had exercised its power to raise money for the purpose of carrying on its civil and military operations.

However, it must be emphasized that such conditions do not here obtain under the facts presented in this record because, as pointed out above, the Postoffice department is only holding the postal savings deposits of the appellee as trustee. The funds remain the property of the Kentucky Fuel Gas Corporation. Such being the true condition, it would no more embarrass the Federal Government for the appellee to be required to pay taxes on money deposited with the Postmaster at Ashland, Kentucky, than it would embarrass the Government for a Kentucky taxpayer to pay taxes on money held by the Government in a bankruptcy proceeding.

In the case of *Swarts* v. *Hammer,* 194 U. S. 441, 49 Law Ed. 1060, there was involved the validity of state, school and city taxes imposed upon $68,200.00 belonging to the estate of a bankrupt in the hands of a trustee in bankruptcy. This Court, as did the Circuit Court of Appeals, (120 Fed. 256) held that the taxes were valid and collectible, in view of the fact that the bankruptcy act did not exempt the property from taxation (without deciding that Congress had the power to grant such exemption).

As of June 9, 1940, the National Banks of America owned $7,219,890,000.00 of direct obligations of the U. S.

Government, and $1,891,336,000.00 of obligations guaranteed by the U. S. Government (Tr. R. P. 9). A large part of these funds undoubtedly represented the deposits of taxpayers of the various States. These deposits were subject to State taxation. (*Clement National Bank* v. *Vermont*, 231 U. S. 120, 58 Law Ed. 547).

The fact that the national banks used the funds of depositors to purchase government bonds did not convert such banks into governmental borrowing agencies, and did not render the depositors of such funds in the bank immune from non-discriminatory state and local taxes. *Clement National Bank* v. *Vermont*, supra.

Postal Savings certificates are taxable in the State of Indiana. There was involved in the case of *Lutz* v. *Arnold*, 193 N. E. 840, the validity of a State Statute which taxed Postal Savings certificates along with other intangible property. In upholding the validity of the Statute, the Supreme Court of Indiana said:

> "We cannot see in what manner or in what way the Act would affect the power to borrow money on the credit of the United States. Neither can we see how it would affect the establishing of postoffices or impose a burden upon the exercise of the power to establish postoffices.
>
> "Title 39 U.S.C.A. Section 758, The Postal Service, provides that postal savings may be withdrawn upon demand. These deposits, as we construe the Act, do not in the strict sense amount to a loan to the United States Government, and therefore the power to borrow money on the credit of the United States is not interfered with or involved. In speaking of the power to tax, the Supreme Court of the United States, in the case of *First National Bank* v. *Kentucky*, said: 'That limitation (upon the power to tax) is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or so far impair their efficiency in performing

> the functions by which they are designed to serve that Government'.
>
> "It can not be successfully maintained that the tax in question interferes with or impairs the efficiency of the government service, nor in the slightest degree diminishes the power of the government to borrow money".

In view of the nature of the property sought to be taxed, which are Postal Savings certificates, by the terms of which the holder can demand immediate payment of his money from the Postoffice Department, it is submitted that this Court's opinion by Mr. Justice Brown, in the case of *Hibernia Savings and Loan Society* v. *San Francisco,* 200 U. S. 310, 50 Law Ed. 495, states the correct principle which is here applicable. It was said:

> "The basis of this assumption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the Government and upon its power to raise money for the purpose of carrying on its civil and military operations".

Since these certificates represent money which can be withdrawn immediately upon demand, and since by the terms of Sec. 759 Title 39 U.S.C., as construed by the Courts, the Postoffice Department holds these funds merely as trustee, there can not be involved any tax upon the credit of the Government or upon its power to raise money for the purpose of carrying on its civil and military operations.

If this be true, then the only question presented to this Court is whether or not there has been a proper classification for the purpose of taxation.

III.

If Congress has the Power to Exempt the Owners of Postal Savings Certificates from State Taxation, It Has Not Exercised Such Power.

A. The Postal Savings Depositories Act exempts from taxation only the bonds provided for in Sec. 760 of Title 39 U. S. C. and under the long established and well recognized rule that the mention of one thing implies the exclusion of another (Taylor v. Barker, 95 N. Y. 474, 475; Crawford's Statutory Construction, page 685; Kendall v. U. S., 107 U. S., 123; Brown v. Md., 12 Wheat, 419; 6 Law Ed. 678, 685; U. S. v. De La Maza Arrendondo, 6 Pet. 691, 8 Law Ed. 547; Jones v. Croswell, 60 Fed. 2nd, 827) the Act itself shows an intention on the part of Congress not to exempt Postal Savings certificates provided for under Sec. 759 of Title 39 U. S. C., even if it had such power.

If Congress had the power to take away from the states the right to levy a non-discriminatory tax upon private property deposited with a local Postmaster, the exercise of such power is not to be implied. *Swarts* v. *Hammer,* supra; *Clement National Bank* v. *Vermont,* supra; *Commissioner of Banks* v. *Chase Securities Corporation,* 10 N.E. 2nd, 472, 488, and cases therein cited.

Mr. Justice McKenna in the Swarts v. Hammer case pointed out that "the question is not the extent of the power of Congress * * * but what Congress intended by the Act * * *. If Congress has the power to declare otherwise, and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations. * * *".

Having dealt with the question of exemption from State taxation, Congress unquestionably reached the conclusion that the taxation of Postal Savings certificates by the states would in no wise affect the operations of the

Federal Government. (*McClellan* v. *Chipman,* 164 U. S., 347; *Graves* v. *New York,* 306 U. S. 450.)

The conclusion reached by Congress is logical. That body of law makers must have recognized that it had only authorized the Postoffice Department to hold the funds of depositors as trustee, and that the funds so held could in no sense, nor for any purpose, be considered governmental funds, especially in view of the fact that they could be withdrawn at any time.

With the adoption by Congress of the policy that Postal Savings certificates should not be exempt from State taxation, it does not lie with the courts at any subsequent date to change this fixed policy of the law makers. *Green* v. *Frazier,* 523 U. S. 233; 6 Law Ed. 878; *C. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 55 Law Ed. 328; *L. & N. R. R. Co.* v. *Ky.,* 183 U. S. 503; 46 Law Ed. 298.

In view of the fundamental rule as recognized and adhered to by this Court in the above cases that it lies wholly and solely with the legislative branch of the Government to determine the policy to be adopted in the matter of legislation, it is earnestly submitted that the Circuit Court of Appeals went too far in its opinion when it changed the policy which had been definitely expressed by Congress in not providing for exemption from taxation of Postal Savings certificates.

B. Sec. 3701 U. S. Revised Statutes has no relation to the Certificates and Bonds provided for in the Postal Savings Depositories Act.

The opinion of the District Court discloses that the above Statute was considered to be controlling, because this language will be found in the District Court's conclusions of the law:

> "Postal Savings certificates are obligations of the United States exempt by Congress from State and

other local taxation by the provisions of Sec. 3701 of the Revised Statutes of the United States, 31 U.S.C.A. Sec. 742". (Tr. Rec. P. 18.)

1. This exemption Statute is the handiwork of a statute reviser, being an assembly of seven separate Acts of Congress passed in the years 1862 to 1870.* Each of these separate Acts authorized a specific indebtedness for the purpose of financing the Civil War, and the exemptions from taxation provision only covers the securities mentioned in each of the Acts.

This Court, with reference to the revised Statutes, has said:—"* * * In construing it we may refer to the purpose and scope of the Act from which it was derived". *U. S.* v. *Mason*, 218 U. S. 517, 525; 54 Law Ed. 1153.

In the title of the Act of Congress in adopting the U. S. Code, it is provided:—"But nothing in this Act shall be construed as repealing or amending any such law, or as enacting into new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactment". Title 1; U. S. C. page 3.

> "The change of arrangements which places portions of what was originally a single section into two separate sections can not be regarded as altering the scope and purpose of the enactment, for it will not be inferred that Congress in revising and consolidating the laws intended to change their effect unless such intention is clearly expressed". *Anderson* v. *Pacific Co.*, 225 U. S. 187, 198, 56 Law Ed. 1047.

The phrase in Sec. 3701 R. S. "and other obligations of the United States" was taken from the Act of Congress of June 30, 1864, Chapter 172, Sec. 1, 13 Stat. 218. In this

* 12 Stat. 346; 12 Stat. 710; 13 Stat. 13; 13 Stat. 218; 13 Stat. 425; 13 Stat. 468; 16 Stat. 272

Statute of 1864, we find:—"An Act to provide ways and means for the support of the Government, and for other purposes". And there is this further provision:—"And all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authorities". The enactment of this Statute was forty-six years before the Postal Savings system was established, and there was no intention whatever on the part of Congress to do other than to finance the Union at that time.

The "obligations" intended to be exempt were the obligations issued for money to support the Government. In the Act bonds, treasury notes, certificates of deposits, and notes of fractions of a dollar were provided for. Instead of using all of these terms, the general term "obligation" was used. This was the first Act in which so many forms of indebtedness were provided.

In construing 13 Stat. 218, it must be remembered that Congress for a century has followed the policy of exempting in each Act the evidence of indebtedness authorized thereunder. The established policy of Congress may be resorted to in construing an Act. See *U. S.* v. *Sweet*, 245 U. S. 563, 62 Law Ed. 473.

In the discussion of this Act, Mr. Hooper of the Ways and Means committee of the House of Representatives of 1893, said as to the exemption provision:

> "In reply I would say that I do not think the Committee looked to any theory about it. They found the general practice since the commencement of the Government had been to exempt from taxation the obligations of the Government issued by the United States under loan bills". Congressional Globe (1863-64, P. 3183).

Then when it was pointed out that there might be a purpose in Mr. Hooper's and the Committee's minds to

exempt more than the securities authorized by the Act, Mr. Hooper said that he would be glad to join in an amendment. This was accepted by the members of the House as a complete indication of no purpose to change this policy or to do more than exempt the securities authorized by that Act. (Congressional Globe 1863-64, P. 3184.)

13 Stat. 218 was only one of a series of acts which raised money by authorizing indebtedness during the Civil War. As Mr. Hooper said "the general practice had been to exempt from taxation the obligations of the Government issued by the United States under loan bills."*

In *Ozawa* v. *U. S.*, 260 U. S. 178, the Supreme Court said:

> "If Congress—desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.
>
> "We are asked to conclude that Congress without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability of so fundamental a change nevertheless—has radically modified a statute always theretofore mentioned and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government—would have been deprived of its force in such dubious and casual fashion."

Not only is there no suggestion of an intention to change to a general tax exemption policy shown in the Congressional Globe but to the contrary there is proof that an amendment expressly making the bonds subject to taxation required the change of only two votes in the house. (Congressional Globe, 1863-1864 P. 3187.)

Further it will be found that since the passage of 13 Stat. 218, Congress has continued the practice of exempting

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* Some of the previous Acts in which this practice was followed are:
12 Stat. 346; 12 Stat. 352; 12 Stat. 710; 13 Stat. 13.

in each act authorizing indebtedness, the evidence which that act authorized.** This policy would not have been continued if 13 Stat. 218 exempted other evidences of indebtedness than that created by 13 Stat. 218.

> "When several Acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."
>
> *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 309.

Further in the 26 Cong. Rec. P. 8209, it is said:

> "But I do not think it was ever contemplated by Congress, even during the war—that having relation only to the original amount of Treasury notes issued—there now being in circulation $346,000,000, that such a large amount of property should be perpetually exempted."

So in 1894 Congress assumed that 13 Stat. 218 only related to the notes, etc., issued thereunder.

We must presume that each portion of a statute is placed therein for a purpose *(Ex Parte Public Nat. Bank,* 278 U. S. 101, 73 L. Ed. 202) and that Congress would not do a vain and useless thing. Hence we find that Congress has never considered 13 Stat. 218 as creating a general exemption provision for if it were a general exemption provision then these many exemption provisions found in subsequent acts were useless.

So we submit that the "scope and purpose" of 13 Stat. 218 was only to exempt the evidences of indebtedness authorized therein, leaving future indebtedness to be exempted in future acts, and was not to create a general exemption provision.

** The Acts of Congress since 1863 which we have found (omitting merely amendatory acts): 13 Stat. 468; 16 Stat. 272; 22 Stat. 165; 30 Stat. 467; 31 Stat. 46; 32 Stat. 484; 36 Stat. 817; 38 Stat. 268; 40 Stat. 35; 40 Stat. 292; 40 Stat. 1310; 48 Stat. 129; 48 Stat. 343; 49 Stat. 20.

The unbroken policy of Congress of exempting in each Act authorizing an indebtedness the evidence of this indebtedness has been noticed by authorities of Federal financing:

> "In the first place, it appears that the states had looked with a jealous eye on the Federal debt as a possible source of taxes, and that the effort to thwart any such intentions led to the insertion of a section *in each of the loan acts* declaring bonds to be free from all taxation by or under State authority". (Emphasis ours.) Love, Federal Financing P. 111. Columbia University Press (1931).

See, also, the case of *People* v. *Hoffman*, 37 N. Y. 9, wherein the Court of Appeals of the State of New York held that the certificates of indebtedness issued under 12 Stats. 352 were taxable. On a writ of error the Supreme Court in reversing this decision (*The Banks* v. *The Mayor*, 7 Wall, 16) was forced to drop back to the doctrine of governmental immunity instead of holding these exemption provisions applicable as was done in the companion case (*People* v. *Supervisors*, 7 Wall, 206) wherein the question of whether Treasury notes issued under 12 Stat. 345, were taxable was presented. Here, then, we had companion cases in the Supreme Court.

In the *Mayor* case the question was presented whether certificates of indebtedness not issued under 12 Stat. 345, 12 Stat. 709, 13 Stat. 13, 13 Stat. 218 or 13 Stat. 425, were exempted from state taxes by the exemption provisions provided thereunder.

In the *Supervisors* case the question was presented whether treasury notes provided for under Section 12 Stat. 345 were exempted by the provisions of these acts. *In the Mayor case the court did not attempt to treat these seven acts as general exemption provisions. In the Supervisors case the Court held that notes issued under an act were exempted by the exemption provision of that act.* So in neither case were these acts in question treated as general

exemption sections but instead were construed in accordance with the New York Court of Appeals decision that "the language is to be applied in each case to the issues authorized by the Acts in which it is found".

From the foregoing authority it is submitted that this Court would not be authorized to construe Revised Statutes Sec. 3701 as having any application at all to the claimed exemption. The proper rule is stated in *Federal Reserve Bank of Dallas* v. *Webster*, 287 Fed. 579, 586.

> "In construing the Revised Statutes, the presumption is against an intention to change the meaning and construction of a statute reenacted therein. Mere changes in phraseology arising from a condensation are not to be regarded as changing the preexisting law. Nor is it to be inferred that Congress, by consolidating or transposing earlier provisions, intended to change their effect unless an intention to do so is clearly expressed".

When the Revised Statutes were adopted, there was no shown intent to create a broad general exemption of governmental indebtedness. The sole purpose was merely to simplify the law and codify the many statutes on the books.

2. If Sec. 3701 Revised Statutes could be considered as relating to the question here presented, the enactment of the Postal Savings system had the effect of repealing Sec. 3701 as it would relate to Postal Savings certificates, since the Postal Savings Depositories Act itself contains a specific exemption provision. (Title 39, Sec. 760, U.S.C.)

In *Cook County National Bank* v. *U. S.*, 107 U. S. 445, 27 Law Ed. 537, 539, Mr. Justice Field enunciated the rule of statutory construction which we submit is here controlling. Said he:

> "The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all of its phases, may thus withdraw the subject from the operation of a general law as effectually as though as to such subject the general law

were in terms repealed. The question is one respecting the intention of the legislature. And although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject.

See *Tracy* v. *Tuffly*, 134 U. S. 206, 33 Law Sd. 879; *Callahan* v. *U. S.*, 285 U. S. 515, 76 Law Ed. 914.

IV.

The Doctrine of Governmental Immunity from Taxation Is Not Applicable to Postal Savings Deposits.

Our next problem is to show that the doctrine of Governmental immunity from taxation does not or should not exempt Postal Savings Deposits, held by a private citizen, from a non-discriminatory property tax.

The Genesis of the immunity doctrine is *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

No provision is found in the Constitution which provides for this immunity. But regardless of this silence of the Constitution, the Court in 1819 found it necessary to create the doctrine of implied immunity to protect an important Federal policy from complete frustration at the the hands of dissident states. The Bank of the United States was established in 1816 and within three years eight states had enacted laws designed to penalize the bank or expel the branches from their territory. (Warren, *The Supreme Court*, I, 505-506.)

The arguments upon which the case rested had their their roots in actuality, but they have been distorted by sterile refinements unrelated to affairs. (Concurring opinion of Mr. Justice Frankfurter, *Graves* v. *New York, ex rel. O'Keefe*, 306 U. S. 466, 488-489.)

In *McCulloch* v. *Maryland,* supra, the State of Maryland had passed a taxing Act aimed at the branch of the Bank of the United States. The tax was a tax on "operations"; the issuance of notes, thus being an excise tax on an activity of the bank.

In invalidating this tax law, Mr. Chief Justice Marshall had occasion to say:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank and is, consequently, a tax on the operations of an instrument employed by the Government of the Union to carry its powers into execution."
>
> (4 Wheat. 316, 336-437.)

So it is to be noted that Mr. Chief Justice Marshall did not extend his opinion to either the real property of the bank or the intangible property of citizens of Maryland in the institution.

Indeed it is to be noted that the whole tenor of the opinion is that a tax on the "operations" or "means employed" by the Government or a Governmental agent is invalid but there is no indication that a non-discriminatory property tax would be invalid.

It is to be remembered that Mr. Chief Justice Marshall was a thorough Federalist (Beveridge, *The Life of John Marshall),* and in his zeal it is submitted that he wrote too far:

> "If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may

tax patent-rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government."

Indeed this dictum has already begun to crumble for patent-rights are taxable *(Fox Film Corp.* v. *Doyal,* 286 U. S. 123) and as noted by Mr. Justice Frankfurter the power to tax is not the power to destroy (306 U. S. 490).

Five years later in *Osborn, et al.* v. *The Bank of the United States,* 9 Wheat. 738, 6 L. Ed. 204, Mr. Chief Justice Marshall clearly indicated that tax on the property of a bank was not invalid:

"It will not be contended that the directors, or other officers of the bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. *It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank.* But we do not admit that the act of purchasing, or conveying the articles purchased, can be under state control." (Emphasis ours.)
9 Wheat. 738, 867.

Again we find the inference that a tax on the property of the Government is not invalid but that a tax on the activity of the government is.

In *Weston, et al.* v. *The City Council of Charleston,* 2 Pet. 449, 7 L. Ed. 481, Mr. Chief Justice Marshall revised

his views on governmental immunity. The United States Government had lived through forty-two years and was growing strong. Marshall, always the exponent of strong central government, was called upon to judge the validity of a tax laid by Charleston on the ownership of stock of the United States. To the Chief Justice, no hindrance, no matter how small, should be placed in the way of the growth of these Federal powers which he had nurtured so he changed his views on immunity, and held this tax invalid. But he did not succeed in carrying the whole court with him. For out of the six justices sitting, two of them dissented.

The *Weston* opinion has been the cornerstone for extending the immunity to treasury notes (*Bank* v. *Sup.*, 7 Wall. 26), and bonds of the U. S. (*Banks* v. *The Mayor*, 7 Wall. 16).

It is important to examine the frame upon which this decision was hung. Three timbers were incorporated:

(1) There is no difference between a law "prohibiting loans to the United States" and a property tax on the evidence of the loan in the hands of the lender.

(2) The tax would affect the terms on which the Government borrowed.

(3) As the power to tax is the power to destroy, a State may not tax the Federal Government.

We believe that if one looks behind the folds of this dictum embroidered opinion, it will be seen that the frame timbers were green and untried, that they have long since dry-rotted, and that the mere drawing aside of the folds has caused the frame of reason to collapse.

Mr. Justice Frankfurter points to the *Weston* opinion as an example of the "distorted-sterile refinements" of the *McCulloch* opinion, 306 U. S. 466, 489.

Let us examine these timbers:

A. Is there a Difference between a Law prohibiting Loans to the United States and a Property Tax on a Chose in Action in the Hands of the Lender?

As to this point we feel that Mr. Justice Thompson's dissenting opinion so aptly shows the faulty reasoning that little more is necessary:

> "In the case now before us, the tax is not direct upon any means used by the government to carry on its operations. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, viz.; the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock and stocks of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired."
>
> (2 Pet. 449, 473–480.)

There is the difference between the taxes struck down in the *McCulloch* and *Osborn* cases. Those taxes were on activities or means used by the Government or its agent. The tax in the *Weston* case was a property tax on intangible property in the hands of the private owner.

In *State Tax on Foreign Held Bonds,* 15 Wall. 300, 320, 21 L. Ed. 179 it was said:

> "The bonds issued by the railroad in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors."

So we say that the property in the case at bar is property in the hands of the holders and not the government.

As we have already pointed out, Mr. Justice Frankfurter indicates *Weston* v. *Town of Charleston* as a "sterile refinement" of *McCulloch* v. *Maryland.*

If there is a place for the doctrine of governmental immunity it has limitations.

> "The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations.
>
> "It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland,* 4 Wheat 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon 'an entire absence of power' (*Johnson* v. *Maryland,* 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' *Willcuts* v. *Bunn,* 282 U. S. 216."
>
> *Fox Film Corp.* v. *Doyal,* 286 U. S. 123.

The immunity should extend to taxes on the government but not one step beyond, to private citizens.

> "The mere fact that the government may to some extent be affected no longer serves to invalidate a non-discriminatory tax laid upon a private person."
>
> Amicus Curiae Brief of the Solicitor General of the United States, Mr. Robert H. Jackson, in *Graves* v. *N. Y., ex rel. O'Keefe,* 306 U. S. 467.

We submit that a non-discriminatory property tax placed upon the choses in action owned by a private person is no more a direct burden on the Federal Government than a non-discriminatory property tax on vehicles in interstate commerce is a burden on that commerce.

In *Brown* v. *Maryland*, 12 Wheat. 419, 449, 6 L. Ed. 678, Justice Marshall said, while invalidating a state tax on importers:

> "*Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic?* or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in McCulloch v. The State of Maryland, 4 Wheat. Rep. 316, the decision in which case is, we think, entirely applicable to this." (Emphasis ours.)

So the Chief Justice held that the doctrine of *McCulloch* v. *Maryland* exempted property in interstate commerce for purposes of traffic. Yet the Supreme Court has completely repudiated this application of *McCulloch* v. *Maryland* by allowing the states to place a non-discriminatory property tax on property moving in interstate commerce for purposes of traffic.

> "The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be."
>
> *Morgan* v. *Parham*, 16 Wall. 471, 21 L. Ed. 303, Also *Pullman Palace Car Co.* v. *Penn.*, 141 U. S. 18, 35 L. Ed. 613; *Johnson Oil Ref. Co.* v. *Okla.*, 290 U. S. 158, 78 L. Ed. 238.

> "Although rolling stock, such as these cars, is employed in interstate commerce, that fact does not make it immune from a non-discrimintatory property tax in a State which can be deemed to have jurisdiction."
>
> *Johnson Oil Co.* v. *Okla.*, supra.

Thus if the applicability of the *McCulloch* v. *Maryland* doctrine to taxation of property engaged in intenrstate commerce has been repudiated, it must follow that the applicability of this doctrine to taxation of property held by private owners should likewise be repudiated.

If a property tax on a vehicle moving in interstate commerce is not a burden on that commerce, there is no justification for the assumption that a property tax on a Postal Savings account in the hands of the depositor is a burden on the Federal Government.

In like manner we may point out that *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 10 L. Ed. 1022, and *Collector* v. *Day,* 11 Wall. 113, 20 L. Ed. 122, were founded on the doctrine of *McCulloch* v. *Maryland.* These cases held that a Federal officer could not be taxed on income or salary received from the Federal Government.

> "In our view it presents a case of as strong interference as was presented by the tax imposed by Maryland in the case of *McCulloch,* 4 Wheat. 316, and the tax by the City Council of Charleston, in *Weston's* case, 2 Peters 449; . . ."
>
> *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 449.

It is ironic that the Justice should pick the *Weston* case as an example of the degree of interference such a tax presented. For it is a poor example that won't work the other way. If the *Dobbins* case presents as strong a case of interference as the *Weston* case, then the *Weston* case must present only as strong a case as the *Dobbins* case. Thus if the *Dobbins* case has been repudiated so should the *Weston* case.

In the *Day* opinion, *McCulloch* v. *Maryland, Weston* v. *Charleston* and *Dobbins* v. *Erie County,* are the cornerstones. It must stand only so long as these cases stand.

In *N. Y. ex rel. Rodgers* v. *Graves,* 299 U. S. 401, 81 L. Ed. 306, *Dobbins* v. *Commissioners of Erie County* was relied upon to support the theory that an income tax could not be collected by a state on the salary of a Government official.

Yet in *Graves* v. *N. Y. ex rel. O'Keefe,* supra, all this was repudiated and the *Day* and *Rogers* opinions were specifically overruled.

Again we may say that if the applicability of the doctrine of *McCulloch* v. *Maryland,* to taxation of incomes of Federal officers has been repudiated, it must follow that the applicability of the doctrine to taxation of Postal Savings held by private owners should be repudiated.

If an income tax on the salary of a Federal official is not an interference with the Federal Government, then a non-discriminatory property tax on Postal Savings accounts held by private owners is not an interference with the Federal Government.

Certain other tax situations present interesting analogies to the case at bar.

A person who exploits lands under a lease from the Federal government cannot claim immunity from a property tax on the oil produced (*Indian Territory Oil Co.* v. *Board,* 288 U. S. 325, 77 L. Ed. 812), or on the machinery and equipment used in the operation. *Tabor* v. *Indian Territory Co.,* 300 U. S. 1, 81 L. Ed. 463. At one time he was immune from taxation on the net income derived from the operations (*Gillispie* v. *Okla.,* 257 U. S. 501, 66 L. Ed. 338, *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 76 L. Ed. 815) but not today. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 82 L. Ed. 907.

The state or Federal government may tax the transfer by will of property to the other. *United States* v. *Perkins,* 163 U. S. 625, 41 L. Ed. 287, *Snyder* v. *Bettman,* 190 U. S. 249, 47 L. Ed. 1035.

The manufacturer of goods may be taxed by the United States even though they are sold to the State after manufacture. (*Liggett & Myers Co.* v. *U. S.*, 299 U. S. 383, 81 L. Ed. 295) as may the transfer of goods to the government purchaser. *Wheeler Lumber Co.* v. *U. S.*, 281 U. S. 572, 74 L. Ed. 1047.

So we feel that the first timber upon which Mr. Chief Justice Marshall hung the *Weston* case (i. e., No difference between a tax prohibiting a loan to the Government and a tax on the evidence of that loan in the hands of the lender) has dry-rotted.

B. Will the Tax Affect the Terms on which the Government Borrows?

The second timber supporting *Weston* v. *Charleston* was that the tax would affect the terms on which the Government borrowed. (2 Pet. 449, 468.)

In considering this timber it is interesting to note the other cases in which it is found.

In *Dobbins* v. *Com. of Erie County,* 16 Pet. 435, 448 and in *Gillispie* v. *Okla.,* 257 U. S. 506 (both of which cases have been in effect overruled), we find the reasoning that the economic burden might be passed on to the government. This is, in principle, the same timber, but whatever strength it may originally have had, the case of *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 82 L. Ed. 155, expressly held in response to the Federal Government's concession that the gross tax on its contractors would result in substantially increased costs to the Government:

> "But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax . . ."
>
> 302 U. S. 134, 160

C. The Power to Tax is Not the Power to Destroy.

As to the Chief Justice's third timber supporting the *Weston* decision (i.e. the power to tax is the power to destroy).

> "The arguments upon which *McCulloch* v. *Maryland*, 4 Wheat. 316, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch* v. *Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." Id., at P. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resutling from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch* v. *Maryland*. . . ."
>
> "All these doctrines of inter governmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen. 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our

federalism and thus, too, when the financial needs of all governments began steadily to mount."

Mr. Justice Frankfurter, *Graves* v. *New York, ex rel. O'Keefe,* 306 U. S. 467, 488.

The proposition that the power to tax is the power to destroy appears to be contradicted by nearly half a hundred decisions of the Court. In thirty-three cases listed below, the Court has sustained taxes on persons who dealt with the Government, which taxes if pressed to discriminatory and oppressive limits, might destroy the governmental function as fully as could the tax in *McCulloch* v. *Maryland.*

Property taxes on contractors:

Thompson v. *Pac. R. R.,* 9 Wall. 579, 19 L. Ed. 792.

Railroad Co. v. *Peniston,* 18 Wall. 5, 21 L. Ed. 787.

Western Union Tel. Co. v. *Cross,* 125 U. S. 530, 31 L. Ed. 790.

Central Pac. Railroad v. *Cal.,* 162 U. S. 91, 40 L. Ed. 903.

Baltimore Shipbuilding Co. v. *Baltimore,* 195 U. S. 375, 49 L. Ed. 242.

Gromer v. *Standard Dredging Co.,* 224 U. S. 362, 56 L. Ed. 801.

Choctaw O. & G. Railroad Co. v. *Mackey,* 256 U. S. 531, 65 L. Ed. 1076.

Property tax on employee:

Dyer v. *City of Melrose,* 215 U. S. 594, 54 L. Ed. 341.

Property tax on lessee:

Thomas v. *Gay,* 169 U. S. 264, 42 L. Ed. 740.

Wagoner v. *Evans,* 170 U. S. 588, 42 L. Ed. 1154.

Ind. Territory Oil Co. v. *Board,* 288 U. S. 325, 77 L. Ed. 812.

Taber v. *Ind. Territory Co.,* 300 U. S. 1, 81 L. Ed. 463.

Property tax on license:

Susquehanna Co. v. *Tax Com.* (No. 1), 283 U. S. 291, 75 L. Ed. 1042.

Broad River Power Co. v. *Query,* 288 U. S. 178, 77 L. Ed. 685.

Tax on sales or payments to contractor:

Fidelity & Deposit Co. v. *Penn.,* 240 U. S. 319, 60 L. Ed. 664.

Trinityfarm Co. v. *Grosjean,* 291 U. S. 466, 78 L. Ed. 918.

Terrill v. *Johnston,* 293 U. S. 533, 79 L. Ed. 641.

Transportation tax:

Wheeler Lumber Co. v. *U. S.,* 281 U. S. 572, 74 L. Ed. 1047.

Manufacturers' tax:

Liggett & Myers Co. v. *U. S.,* 299 U. S. 383, 81 L. Ed. 294.

On Vendor; net income tax on contractor:

Metcalf & Eddy v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384.

General Construction Co. v. *Fisher,* 295 U. S. 715, 79 L. Ed. 1671.

Atkinson v. *State Tax Com.,* 303 U. S. 20, 82 L. Ed. 621.

Net income tax on employee:

Helvering v. *Gerhardt,* 304 U. S. 405, 82 L. Ed. 1427.

Graves v. *New York, ex rel. O'Keefe,* 306 U. S. 466, 83 L. Ed. 927.

Net income tax on lessee:

Group No. 1 Oil Corp. v. *Bass,* 283 U. S. 279, 75 L. Ed. 1032.

Helvering v. *Bankline Oil Co.,* 303 U. S. 362, 82 L. Ed. 897.

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 82 L. Ed. 907.

Net income tax on licensee:

Fox Film Corp. v. *Doyal*, 286 U. S. 123, 76 L. Ed. 1010.

Gross receipts tax on contractor:

Alward v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155.

Mason Co. v. *Tax Comp.*, 302 U. S. 186, 82 L. Ed. 187.

License tax on licensee:

Federal Compress Co. v. *McLean*, 291 U. S. 17, 78 L. Ed. 622.

Property tax on treasury checks:

Hibernia Savings Soc. v. *San Francisco*, 200 U. S. 310, 50 L. Ed. 495.

After the flaws in this timber have been exposed by Justices Frankfurter and Holmes, we proclaim that nothing is left of the frame which supported the *Weston* v. *Charleston* decision exempting from a non-discriminatory property tax bonds of the United States.

As the frame has crumbled, the *Weston* decision should be condemned and then quietly forgotten, as is most other bad fiction of the period.

And so the doctrine of governmental immunity should again return to within the limitations from whence is overflowed and be applicable only to "activities" or "means employed" by the Government.

CONCLUSION.

There is no inclination or intention on the part of the State taxing authorities of Kentucky to interfere with the operations of the Federal Government, which is our Government. However, our Government is not so impotent that the taxation of Kentucky taxpayers holding Postal Savings certificates would operate in any manner to cripple it or to prevent it from being able to secure sufficient funds with which to carry on its functions.

The non-discriminatory intangible property tax levied by the Kentucky Statutes upon its citizens and residents is not of such a character as to interfere with any function performed by the Federal Union, because the credit of the Government is not involved, nor is the holding of Postal Savings deposits for the taxpayers of Kentucky an exercise by the Government of its power to raise money for the purpose of carrying on its civil and military operations.

It is therefore urged that the opinion of the Circuit Court of Appeals and the judgment entered thereon should be reversed.

Respectfully Submitted.

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